JUDICIAL DETERMINATION OF THE STATUS OF FOREIGN GOVERNMENTS. — A delicate problem faces any court called upon to determine the validity of an act done under the authority of a foreign government. Three situations may arise: first, where the foreign government had been recognized by the sovereign of the forum before the act in question; secondly, where the foreign government has received recognition between the time of that act and the time of the litigation; thirdly, when at that later date there has been no recognition.

In cases where recognition antedates the act the validity of which is tested in the litigation, the court is bound to follow the determination of the political departments, to which the foreign affairs of the nation are entrusted.[1] The quality of the recognition, whether *de jure* or *de facto*, does not alter the problem.

The second situation presents a more difficult question. Probably the majority of the decisions treat the intervening recognition as retroactive to the time of the accession, and so resolve the second into the first situation. On this theory a recent English case [2] held that the recognition of the Soviet Government by the British Foreign Office in 1921 related back to the Soviet accession to power,[3] so as to validate the passage of title to personalty condemned [4] under Soviet proceedings in 1918. American courts likewise have frequently approved of the doctrine of retroactivity.[5] It involves, however, an undesirable fiction, which in its application may contradict not only actual historical facts, but also the evident intention of the political department. Moreover, the practical and logical difficulties which it presents are numerous. How far back recognition should relate, — whether a previous affirmative refusal to recognize should set a boundary to possible retroactivity, — and whether the political department may by express terms confine to a particular limit the retroactive force of its recognition; [6] — these are but a few of the problems suggested.

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[1] Jones *v.* United States, 137 U. S. 202 (1890). See Williams *v.* Suffolk Insurance Co., 13 Pet. (U. S.) 415 (1839); Foster *v.* Neilson, 2 Pet. (U. S.) 253, 307 (1829); Garcia *v.* Lee, 12 Pet. (U. S.) 511 (1838); O'Neill *v.* Central Leather Co., 87 N. J. L. 552, 94 Atl. 789 (1919).

[2] Aksionairnoye, etc. A. M. Luther *v.* Sagor & Co., [1921] 3 K. B. 532. For the facts of this case see RECENT CASES, *infra*, p. 619.

[3] This was in December, 1917, when the provincial government, which had been recognized by the United States by the Act of Ambassador Francis, March 22 of that year, was supplanted. See New York Times Current Hist. Mag., VI, 293.

[4] If done as a governmental act, condemnation of personal property is valid in the absence of constitutional protection. By a military conqueror it would be invalid under Art. 46, Hague Peace Conference of 1907. See II SCOTT, THE HAGUE PEACE CONFERENCE, 397–398.

[5] Oetjen *v.* Central Leather Co., 246 U. S. 297 (1917); Underhill *v.* Hernandez, 168 U. S. 250 (1895); Ricaud *v.* American Metal Co., Ltd., 246 U. S. 304 (1917). See Williams *v.* Bruffy, 96 U. S. 176, 186 (1877); Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140, 146 (1863); State of Yucatan *v.* Argumedo, 92 Misc. 574, 157 N. Y. Supp. 219 (1915). But see Kennett *v.* Chambers, 14 How. (U. S.) 38 (1852), where the court refused to treat the recognition of Texas in March, 1837, as retroactive to September, 1836. See also United States *v.* Trumbull, 48 Fed. 99 (S. D. Cal., 1891).

[6] In Luther *v.* Sagor & Co., *supra*, the court construed a statement of the foreign office that the Soviet Government was recognized "as from Mar. 16" to mean "as on Mar. 16." "As on Mar. 16" was then construed to mean "as on Mar. 16 and

Courts that reject the retroactive theory in the second situation are faced with the identical problem which all courts meet where the facts arise under the third. Three solutions are then available. First, until an affirmative recognition is accorded by the political department, the prior status may be deemed to continue.[7] This fiction, too, frequently mocks the truth. Recognition being a concession, not a right,[8] it is clear that silence by the executive does not necessarily connote that a new government[9] does not *de facto* exist. Considerations of policy,[10] or interests of diplomacy, may restrain a political expression of recognition long after a government is in actual *de facto* control. This alternative, moreover, in jurisdictions where in the second situation the retroactive theory is accepted, results in an arbitrary distinction. In a suit by X brought before any recognition, the governmental act of the foreign *de facto* authority would be declared a nullity, while in a suit by Y, brought after recognition, the same act would be declared valid. Again, the logical extension of this doctrine involves the unfortunate result that where a *de facto* government [11] fails, without having been recognized as such, all of its acts are void.[12] Thus to hold that a *de facto* authority, in complete control of the government, must maintain its position till recognition in order to validate its governmental acts,[13] offends both reason and justice.

A second and more commendable practice is that of allowing the court to investigate the situation as a matter of fact, and independently to decide the status in question.[14] Where the political department has

prior," thus relating it back to the time of the original accession of the Soviet officials. It seems not unreasonable that the Secretary was attempting to limit the period within which retroactivity, if intended at all, was to apply.

[7] Marshall, J., in Rose *v.* Himely, 4 Cranch (U. S.) 241, 272. Story, J., in Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 324 (1818). *Accord:* Kennett *v.* Chambers, 14 How. (U. S.) 38 (1852); Williams *v.* Suffolk Insurance Co., 13 Pet. (U. S.) 415 (1839); Dimond *v.* Petit, 2 La. Ann. 537 (1847); Clark *v.* United States, Fed. Cas. No. 2838 (D. Pa., 1811); The Hornet, Fed. Cas. No. 6705 (D. N. C., 1870). See United States *v.* Hutchings, 2 Wheel. Cr. C. (N. Y.) 543 (1817); Neuva Anna, 6 Wheat. (U. S.) 193 (1821); United States *v.* Pico, 23 How. (U. S.) 321 (1859).

[8] See MOORE, DIGEST OF INTERNATIONAL LAW, § 27. But see HALL, INTERNATIONAL LAW, 7 ed., 88, where it is said that recognition cannot be withheld when earned. Yet the United States in the case of Huerta in 1913, and perhaps with reference to Soviet Russia to-day, clearly takes the position that where a government is in control, and able and willing to assume its foreign obligations, recognition may be withheld if the moral character of the government is questionable. Where the moral force operated the other way, we have gone to the extreme of recognizing a government which had no geographic locations, and no *de facto* existence, as in the recognition of the Czecko-Slovak Nation, Sept. 2, 1918. See 12 AM. POL. SC. REV. 715–718.

[9] The distinction between the recognition of a new government and the recognition of a new state is pointed out by MOORE, *op. cit.*, § 78. See on this point, 5 AM. J. INT. LAW, 66–83.

[10] Thus the United States never recognized Huerta, in Mexico. See note 8, *supra.*

[11] Well defined in Thorington *v.* Smith, 8 Wall. (U. S.) 1, 9 (1868), as a government of paramount force.

[12] See language to this effect in Williams *v.* Bruffy, 96 U. S. 176 (1877). But *contra*, United States *v.* Rice, 4 Wheat. (U. S.) 246 (1819).

[13] Seward expressed the opinion, in a letter to the Mexican Minister Romero Aug. 9, 1865, that temporary *de facto* power was enough to validate a governmental act. See DIP. COR. 1865, III, 486–488, quoted in part in MOORE, *op. cit.*, I, 238.

[14] Divina Pastora, 4 Wheat. (U. S.) 52 (1819); The Josepha Segunda, 5 Wheat. (U. S.) 238 (1820). In 1821, however, the United States Supeme Court repudiated

been absolutely silent this approach has perhaps its greatest justification. But a distinction must here be observed between cases where the issue turns upon the *recognition* and those where it turns upon the *existence* of the *de facto* government. In the former, political consequences may be involved and the jurisdiction is therefore a dangerous one for the court to exercise. In the latter the court can function with greater safety, though with less facility, because of the greater difficulty of proof of the actual facts. The risk of an inaccurate finding, however, is one which the litigants have invited, and if the burden of proof is one which they are unable to sustain, they cannot complain.

The third and it seems the most sound approach to this problem is supported by very little authority. In *United States* v. *Trumbull*,[15] the court spoke through Mr. Justice Rose: "It is beyond question that the status of the people composing the Congressional party at the time of the commission of the alleged offense, is to be regarded by the court *as it was then regarded* by the political or executive department of the United States." And in 1918 the English Chancery Division actually did send to the political department for a precise statement concerning the status of the government in question at the time of the act under consideration.[16] This approach alone seems free from objection. Nor is it coercive on the political department, especially since qualified recognitions [17] are established by international custom. Moreover, it is applicable alike to all situations. It assures uniformity and consistency, and abolishes fictions. Even where there has never been recognition and the issue is the existence of the *de facto* governments, in which case a political expression would of course be only evidence, and not binding — it would be a preferable practice to that of permitting the court to proceed on evidence offered by the litigants. The government can much more conveniently and accurately, through its consular and diplomatic records, determine the real situation. Where there has been recognition, requesting a political expression of its character and extent avoids the friction [18] likely to follow a judicial determination. Had the English Court of Appeals in the present case accepted the precedent of Chancery in this respect, it would have avoided the result now achieved, of holding [19] that recognition from the Foreign Office in 1921 related back so as to constitute a political recognition

this practice. See La Conception, 6 Wheat. (U. S.) 235 (1821), overruling 2 Wheel. Cr. C. (N. Y.) 597 (1819). A more recent expression seems to modify this view. See Ricaud *v.* American Metal Co. Ltd., 246 U. S. 304 (1917). See also Lincoln *v.* United States, 197 U. S. 419 (1905).

[15] 48 Fed. 99, 104 (S. D. Cal., 1891). [16] *In re* Suarez, [1918] 1 Ch. 176.

[17] So-called recognition *sub modo*. HALL, INTERNATIONAL LAW, 83. MOORE, DIGEST OF INTERNATIONAL LAW, § 27.

[18] The status of a foreign government is primarily a political question. MOORE, *op. cit.*, § 50. HALL, *op. cit.*, 83, *ff.* See 62 SOL. J. & W. REP. 359, and 14 AM. J INT. LAW, 523 (1920). See judicial expressions in United States *v.* Palmer, 3 Wheat. (U. S.) 616, 634 (1818); Luther *v.* Borden, 7 How. (U. S.) 1, 42, 43, 57 (1849); United States *v.* Trumbull, 48 Fed. 99 (S. D. Cal., 1891); United States *v.* Hutchings, 2 Wheel. Cr. C. (N. Y.) 543 (1817); The Three Friends, 116 U. S. 1, 63 (1897).

[19] The question of recognition should never have been raised in the case, but the court treated it as the essential element. If the Soviet was *de facto* the government of Russia, title to the property condemned would have passed by the subsequent

of the Soviet Government in 1918, although the Prime Minister [20] in 1919 had said: "The Bolshevist government has committed crimes against the allied subjects, and has made it impossible to recognize it even as a civilized government."

THE POWER OF A COURT OF EQUITY TO ORDER A NONRESIDENT DEFENDANT TO DO A POSITIVE ACT IN ANOTHER STATE. — The power of a court of equity acting *in personam* to order a positive act in another state has generally been denied [1] on two grounds: interference with the sovereignty of the other state [2] and inability to enforce the execution of its decree.[3] Interference with the sovereignty of the other state, however, is a circumstance appealing to the discretion of the chancellor rather than a bar to the jurisdiction, and although in a particular case it may be so great as to be ground for denying relief it should not be used as a solving phrase.[4] States do not exercise a "visitorial jurisdiction" over every private act affecting property within their territory.[5] Moreover, there is a strong social interest in this country where business has so little regard for state lines [6] not to make such state lines impassable barriers to the specific performance of an obligation to deliver property beyond the state border.[7] No court will willfully make a decree

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sale whether or not England had recognized the Soviet Government politically. This distinction is generally overlooked. See Pelzer *v.* United Dredging Co., reported N. Y. L. J., Feb. 9, 1922, P. 1659.

[20] Lloyd George, in the House of Commons, April 16, 1919.

[1] The effect of the general statement is somewhat limited by the fact that cases ordering positive acts in another state do occur in the books. Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541 (1908) (production of books before the grand jury); Vineyard Land Co. *v.* Twin Falls Co., 245 Fed. 9 (9th Circ., 1917) (protection of local property); Kempson *v.* Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625 (1902) (vacating a decree of a court in another state); Langford *v.* Langford, 5 L. J. Ch. [N. S.] 60 (1835) (receiver of Irish rents). But *cf.* Port Royal Ry. Co. *v.* Hammond, 58 Ga. 523 (1877). See Joseph H. Beale, "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 289, 292.

[2] The courts have stopped only at direct interference; indirect interference of all sorts is tolerated. Massie *v.* Watts, 6 Cranch (U. S.) 148 (1810) (specific performance: land in another state); Gardner *v.* Ogden, 22 N. Y. 327 (1860) (constructive trust: land in another state); Alexander *v.* Tolleston Club, 110 Ill. 65 (1884) (tort in another state). *Cf.* Mississippi R. Co. *v.* Ward, 2 Black (U. S.) 485 (1862 (no abatement of a nuisance in another state). See further KERR, INJUNCTIONS, 5 ed., 12.

[3] See 17 HARV. L. REV. 572.

[4] But see Joseph H. Beale, *supra*, at 292.

[5] A deed to land in another state executed under duress of the local court is valid at the *situs*. Gilliland *v.* Inabnit, 92 Iowa, 46, 60 N. W. 211 (1894).

[6] See Nichols & Shepard Co. *v.* Marshall, 108 Iowa, 518, 520, 79 N. W. 282 (1899).

[7] Other grounds tentatively suggested in support of the power of equity to order a positive act in another state are consent implied from considerations of mutual benefit, the fact of federal union, the relinquishment of many of the prerogatives of sovereignty by the states, and their community of interests. See 21 HARV. L. REV. 354, 355. The relinquishment of prerogatives to the federal government and the fact of federal union, however, would not extend the power of a sister state.

It has been stated as a matter of fact that the modern tendency is to attach less weight to interference with the sovereignty of another state. See 30 YALE L. J. 865. But it would seem that the courts are reluctant to interfere with property in a foreign country where there is no business justification for so doing. Matthaei *v.* Galitzin, L. R. 18 Eq. 346 (1873). See further, Joseph H. Beale, *supra*, at 292.